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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court of Appeals for the State of West Virginia, Charleston, West Virginia**

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## PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court of Appeals for the State of West Virginia, Charleston, West Virginia**

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Ray Crookham of Mason County, West Virginia, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia, entered on the 10th day of March, 1959, reversing the judgment of the trial court of Mason County, West Virginia, in favor of the petitioner, an injured railway employee, on a finding of fact made by a jury in a Federal Employers' Liability Act case, by which decision the Supreme Court of Appeals of West Virginia set aside a verdict of a jury, and granted a new trial, and remanded to the trial court.

The Supreme Court of Appeals of West Virginia, denied petitioner his right of a trial by jury guaranteed

by the Constitution and given him by Congress under the Federal Employers' Liability Act (45 USCA Sec. 51, et seq) by disregarding all findings of the jury, both in an answer to a special interrogatory, *decided adversely to the defendant*, and a general verdict, in the plaintiff's favor, made on conflicting evidence, thus denying to the petitioner his rights under the State and Federal Constitutions. The Supreme Court of Appeals of West Virginia refused on April 6, 1959, an application for a rehearing.

## OPINIONS OF THE COURTS BELOW

The opinion of the trial court, in favor of the petitioner on the defendant's motion to set aside the verdict of the jury, is unreported and is set out in the appendix to this petition. (Appendix p. 3a)

The opinion of the Supreme Court of Appeals of West Virginia, handed down on March 10, 1959, reported in 107 S.E. 2d 516, but unreported in the West Virginia reports to date, is set out in the appendix to this petition. (Appendix p. 6a) Petition for rehearing was timely made and denied on April 6, 1959, as shown by order set out in the appendix of this petition. (Appendix p. 18a). On April 7, 1959, a motion was made before the Supreme Court of Appeals of West Virginia, pursuant to Chapter 58, article 5, section 31 of the Code of West Virginia, to stay the mandate of the Court for the purpose of making application to this Court for a writ of certiorari, which motion was granted as indicated by an order set out herein. (Appendix p. 19a), and the bond requirement as set out in said order has been compiled with as indicated by a certificate of the clerk of the circuit court of Mason County, West Virginia, also made a part hereof. (Appendix p. 20a)

## JURISDICTION

1. Jurisdiction to grant the prayer of this petition is sustained by title 28 USCA Sec. 1257 (sub-section 3).

2. The United States statutes applied by the Supreme Court of Appeals of West Virginia was 45 USCA 51-59 and 51 U.S.C. 51 to 59.

3. Judgment of the Supreme Court of Appeals of West Virginia was rendered against the petitioner on the 10th day of March, 1959. Rehearing was denied on the 6th day of April, 959.

4. The Supreme Court of Appeals of West Virginia is the highest court of that state in which decision could be rendered within the meaning of 28 USCA 1257.

W. Va. Constitution Art. VIII, Sec. 1

*Harbert* v. *County Court*, 129 W. Va. 54. 39 S. E. (2d) 177

*W. Va. Northern Ry. Co.* v. *George Pritt*, 336 U.S. 961, 69 S. Ct. 891, 93 L. Ed. 1113

## QUESTIONS PRESENTED

The question presented is whether the Supreme Court of Appeals of West Virginia in disregarding all the issues passed upon by the jury, both on a special and general verdict, in favor of the injured employee, and in the setting aside the judgment of a trial court, rendered in favor of the injured employee, had deprived the injured employee of the right of trial by jury given him under a Federal Statute, generally known as the Federal Employers' Liability Act, and under the Constitution of the United States, Article VII Section 2 and Article VII of the Amendments to the aforesaid Constitution.

## STATEMENT OF FACTS

Petitioner, Ray Crookham, sixty three years of age, and employed for forty two years by respondent in railroad work as a section hand, sustained permanent and totally disabling injuries, on the 28th day of December, 1955, while engaged in the work of his employer incident to the removing and loading (without tie tongs) of water soaked cross ties as a part of the discontinuing of a passing track, then a part of respondent's main railroad line. The customary method of lifting ties from the ballast bed was by the use of tie tongs, so construed (for safety reasons) to make it impossible for any number of men less than four to lift a cross tie (See picture of tongs, R. 259-261). On the date of the injury, the railroad foreman with only two pairs of regularly used tie tongs on the job (R. 228) sent four men, including the petitioner here, to a work site about one hundred and twenty five rods away, to remove ties from a passing track bed, but did not request or suggest the use of tie tongs. Arriving at the work site, the four men found that they were to load an old fashioned high bedded, non-dump truck, the bed of which stood four feet above the ground (the ordinary bed stands three feet above the ground) without tongs. The foreman did not accompany these men to the job, but remained with three other men building a fence—a non-hazardous work. Respondent normally furnished its own commercial dump truck, (R. 48), the bed of which stood only three feet above the ground, and the height of the rear part of the bed could be lowered by hydraulic lift (R. 49). After hand loading had progressed for a short time the ties piled up on the back of the truck and interfered with further loading. By necessity one member of the four men left his crew and went to the truck to assist the owner (not a railroad employee) in rolling

back and placing the ties, a practice, had a foreman then been present, would not likely have permitted. The man who left the job was Crookham's work buddy and Crookham's lifting burden and strain was from that time forward substantially increased—many times doubled. The loading of ties continued from 9:45 A.M. to 2:30 P.M. with, in the main, a three man crew, (R. 54) during which time 80 heavy, water-soaked cross ties were dug (by the help of a bar only) from their water-soaked bed and lifted by hand to the truck bed, and to each increased elevation as the ties piled up. These ties weighed from 125 to 225 pounds each (R. 140, 195, 223).

The customary method of lifting and loading ties, was for two men to lift one end of a tie with a set of tongs (a set of tongs consisted of one pair with two lifting handles—much like a pair of cutting scissors) and two other men to lift the other end with another set (or pair) of tongs. That such is the accepted method is admitted by foreman Whittington when he answered in the affirmative this question: "It takes four men to load ties?" (R. 227). If it took four men to load ties; two sets (or pairs) of tongs would be needed. Yet foreman Whittington admits there were only two pairs of tongs on the job. (R. 228)

Q. "Now didn't you testify here yesterday that you have only two pairs of tongs on the truck or job?"

A. "Yes."

Simultaneously with the loading of ties, foreman Whittington and his three men were using one pair of tongs at another place on the job as indicated by this question and answer:

Q. "How did you get the ties over to the post holes?"

A. "Pair of tongs." (R. 228)

Therefore, it must be concluded that tie tongs were not furnished to the petitioner because they were not available, which is an act of negligence.

While in the act of lifting one end of a heavy, water-soaked tie, Crookham felt, (simultaneously with the lift) a burning sensation in one of his eyes. (R. 55). After finishing his lift, petitioner asked the crew to wait long enough to permit him to remove his glasses and examine his eye. (R. 55). He discovered his vision was blurred (R. 56-57)—no evidence disputed this. This was the first notice of impaired vision. Later, he submitted himself to the hospital and was told he had a large detachment of the retina extending over the infero-temporal half of the retina. An operation on the eye and long periods of hospitalization followed. This injury resulted in a substantial and permanent loss of the sight of the petitioner's left eye. He has never worked since. (R. 104)

The negligence acts charged are:

1. In not furnishing and supplying a foreman to go with and supervise the four men crew in loading ties.

2. In not furnishing petitioner with sufficient number of safety tie tongs (designed so that no number of men less than four could use the same) customarily used in handling and loading ties. (a fact found by the jury).

3. In requiring an employee in the absence of a foreman to load by hand an old fashioned, high bedded non-dump truck (standing four feet high) instead

of an ordinary truck (three feet high) with heavy water-soaked ties.

4. To permit the work buddy of Ray Crookham to leave the job to assist the truck owner in rolling back ties being loaded on his truck, thus increasing the lifting load and the burden upon the petitioner.

The case came on in the lower court on the 20th day of May, 1957, and at the conclusion of the three day trial, was submitted to the jury upon the instructions of both parties, and on a *special interrogatory propounded by the defendant itself.* This interrogatory asked the jury: "Should the section crew have used tie tongs to load the ties on the Sayre truck?" The jury returned a general verdict for the plaintiff and assessed his damages at $12,500.00, and *replied to the special interrogatory in the affirmative.* Thus, we have a general and a special verdict by the jury in the petitioner's favor.

A motion was made by defendant to set aside the verdict and argued in vacation of the trial court. The trial court handed down a written opinion (Appendix p. 3a) in which it stated, in effect, that the jury found the defendant was negligent in not furnishing tie tongs to be used in lifting the ties, and (2) that the "jury also could have found that it was negligent in not sending a foreman along with the four men engaged in a new and different kind of work . . ." (R. 17) (Appendix p. 3a)

Judgment was entered on the verdict and the defendant applied to the Supreme Court of Appeals of West Virginia, for a writ of error, which was granted. The case was set on the docket, and after oral argument and the filing of written briefs, said court of appeals set aside the jury verdict and granted the defendant a new trial. (See Court's decision in appendix to petition p. 6a)

Petitioner contends that the Supreme Court of Appeals of the State of West Virginia in reaching this decision ruled contrary to the trial court, to the former decisions of the West Virginia Supreme Court of Appeals, and to the law propounded by this Court.

*Stone* v. *N. Y. C. & St. L. R. Co.* 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358

*Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443

*Webb* v. *Illinois Central R. Co.* 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451

*Ferguson* v. *Moore-McCormack Lines, Inc.* 352 U. S. 521, 1 L. Ed. 2d, 511, 77 S. Ct. 457

*Deen* v. *Gulf, C. & S.F. Ry. Co.* 353 U. S. 925, 1 L. Ed. 2d 721, 77 S. Ct. 715

*Thompson* v. *Texas & Pac. Ry. Co.* 353 U. S. 126, 1 L. Ed. 2d 722, 77 S. Ct. 698

*Arnold* v. *Panhandle & S.F. Ry. Co.*, 353 U. S. 360, 1 L. Ed. 889, 77 S. Ct. 840

*Ringhiser* v. *Chesapeake & O. Ry. Co.*, 354 U. S. 901, 1 L. Ed. 2d 1238, 77 S. Ct. 1093

*Gibson* v. *Thompson, Trustee*, 355 U. S. 18, 2 L. Ed. 2d 1, 78 S. Ct. 2

*Ferguson* v. *St. Louis-San Fran. Ry. Co.* 356 U. S. 41, 2 L. Ed. 2d 571, 78 S. Ct. 671

*Moore* v. *Terminal Ry. Co.* 3 L. Ed. 2d 24

*Walls* v. *McKinney*, 139 W. Va. 866, 81 S.E. 2d 901

*Pritt* v. *W. Va. N. R. R. Co.* 132 W. Va. 184, 51 S.E. 2d 105

## REASONS FOR GRANTING WRIT

1. The jury found in favor of petitioner, Crookham, that:

(a) Crookham sustained injuries to his body on December 28, 1955, while removing by hand, (without tongs) water-soaked switch ties from the railroad ballast bed.

(b) Employer failed to supply Crookham with safety tie tongs, a foreman to supervise his work, and required him to load, by hand, an old fashioned high-bedded truck the like of which he had never loaded before.

(c) The employer was negligent and the same was the proximate cause of Crookham's injury.

(d) Crookham's injury was traumatic in origin and caused by the negligence of the defendant.

2. The petitioner submits that the record in this case contains ample evidence to support the verdict of the jury on each of the above issues.

3. The jury weighed the evidence and decided for the petitioner and against the railroad company on each of the above issues. The trial judge having heard all the evidence and the defendant's argument on motion for a new trial, was of the opinion that the evidence supported the jury's verdict, as indicated by the trial court's written opinion. (Appendix p. 3a) The trial court entered judgment on the verdict for the petitioner. The jury not only found a general verdict for the petitioner, *but found against the defendant railroad company on the special interrogatory*, thus making a special and a general finding of negligence against the defendant.

4. Due to the nature of the petitioner's injury many questions involved were highly technical. The petitioner presented to the court two medical witnesses, both of whom were surgeons and specialists, skilled in the anatomy of the eye. (R. 95, 236). *It is significant that the defendant introduced no medical witnesses in refutation.* The West Virginia Supreme Court of Appeals in reviewing the verdict of the jury, disregarded the testimony of the highly technical medical witnesses, and based its opinion on general statements of mere medical possibilities, which were not in any way connected or applicable to the petitioner's injury. When asked if he had an opinion as to whether or not the lifting of the cross ties could have been the inciting or producing cause of the detachment of the retina, Dr. Pinschmidt said: "Yes, I do believe the lifting of the cross ties could have been the inciting cause." (R. 103) Dr. Humphries, said about the effect of the lifting of the cross ties: ". . . it is not beyond my belief that this could have been a factor." (R. 243) *The respondent made no effort to dispute this medical testimony and it stands in the record unimpeached.*

5. The Supreme Court of Appeals of West Virginia in the case at Bar was of the opinion that the injury might have occurred at another time. There is ample evidence that injury to the plaintiff occurred while he was engaged in lifting railroad ties. Dr. Pinschmidt, the treating physician, as well as Dr. Humphries, gave testimony that the trauma sustained by Crookham was the competent producing cause of the detached retina. This testimony in all respects is in line with introduction of evidence and was not a mere inference of opinion but left the question to the province of the jury of whether or not the specific

trauma was competent to produce that particular injury. It is to be noted in the testimony of Dr. Pinschmidt (the same can be said of Dr. Humphries' testimony also) that he found the tissues of both eyes normal and of the same nature, degenerated only in consistency with Crookham's age. The first inquiry as to whether the trauma was competent to inflict some harm which would affect the course of the underlying process in the organs involved was most important. Something must be added or taken away from what existed before. Medically, the jury found the lifting of the ties affected the then existing physiological structure involved in the disability, the detachment of the retina then, was not coincidental but was causally connected with the tie lifting. Crookham suffered from nothing but the normal degeneration consistent with his age. All the medical testimony concerning the lifting of the cross ties was that the same was the competent producing cause of the detachment of Crookham's retina. The weight of the evidence was left to the jury. That was the disability before the Court. The jury decided on the medical evidence before it, that lifting of the cross ties was the competent producing cause of the detachment of Crookham's retina. (R. 95-116; 235-253). In effect, Crookham was saying, through his doctor, to the jury, "This is what I was. Look at me as I am now after lifting the ties. Whatever was underlying in me was dormant, the defendant's action caused my injury. It was dormant and you brought it to life. By what right did you destroy the balance of nature and health at my age and plunge me into the misery of my disability." We believe the Court ignored the question of the precipitating factor in its decision and invaded the province of the jury which invasion is contrary to the established rule in West Virginia and this Court.

*Bowen* v. *Huntington*, 35 W. Va. 682

*Barker* v. *Ohio River R. R. Co.*, 51 W. Va. 423.

The West Virginia Appellate Court in the case at bar again finds: (Appendix p. 10a)

> "Some of these eyes may have been affected prior to the injury by undiagnosed forms of chorio-retinitis or irido-cyclitis."

In light of the contents of the record in this case this statement is unsupported by any evidence. On the contrary, Dr. Pinschmidt said:

> "—that the condition of the right eye and of the left eye was in normal limits." (R. 101)

Then the Doctor said that had Crookham suffered from any predisposed condition of disease or otherwise of the eye, save those of the normal deterioration from age, "—It would have been unwise to operate—" (R. 106-107. and 115) Thus there is no testimony in this record of previous eye disability, sufficient in nature to have produced the injury here in the absence of trauma.

With all candor, it is believed that the West Virginia Appellate Court stepped out of its roll as a Court of review and made a finding of fact, the same as if it were sitting in lieu of a jury. This is contrary to its own former pronouncements and to the holdings of this court. *Pritt* v. *W. Va. N. R. R. Co.*, 132 W. Va. 184, 51 S. E. (2d) 105. *Rogers* v. *Missouri P. R. Co.*, *Supra*. Thus, the petitioner has been deprived of his right of trial by jury given him under the Federal Employers' Liability Act, and the West Virginia State Appellate Court should be reversed.

6. At the time the petitioner sustained his injury he was not engaged in ordinary routine jobs such as were

ordinarily assigned to a section gang. Rather, it is shown by the evidence that the work which the section gang was instructed to do by their superior was done in an unusual way and in a manner as to place extraordinary burden upon this petitioner. (R. 82)

7. The railroad admits that the safe way of loading ties is by safety tie tongs as indicated by the ownership and presence of tie tongs. This is admitted by the very act of designing and furnishing safety tongs to this and other jobs. (Tongs so constructed as to make it impossible for any number of men less than four to lift a tie R. 227) Here, the petitioner was asked to load ties by hand in a slipshod method without the instruction and supervision of a foreman, (R. 225) which resulted in his lifting over a period of many hours all of the weight of one-half of a large number of heavy water-soaked ties, the like of which he had never done before. The strain required to lift these ties was increased by the vacuum normally found in a wet tie bed. This lifting and strain was, of course, repetitious over a period of time, the sum total of which was disabling. The foreman admits that there were only two pairs of tongs on the job (R. 228) and he and three other men were using one pair of them leaving available only one pair of tongs—four men must have not less than two pairs before they could lift one tie. Crookham was also asked to lift the weight of one-half of many ties (without tongs) one foot higher than he had ordinarily lifted the same, the like of which he was never called upon to do before. (R. 144-145) Had a foreman been sent to this job he could have required each member of the section gang to lift his own part of the load and could have prevented a member of the gang from leaving his crew to assist the truck owner, (to whom the respondent owed no obligation).

Since the digging of post holes and the setting of posts is considered non-hazardous work, the foreman could have left these three men and gone to the place where the four men were doing a new kind of work in a new way. The foreman knew that the four men loading ties had no tie tongs, (R. 225) and also knew there was not a sufficient number of tongs on the job to accomodate two tie crews.

8. The foreman's indifference to the safety of Crookham who was called upon to load a truck the like of which he had never loaded before, and in a new and unusual way, without the use of tie tongs, is excelled only by the indifference of the foreman to Crookham's injury after it had occurred. Crookham, after advising his foreman of his injury, was permitted to remain on the job and work for an additional time of two and one-half days. Then when Crookham discovered the seriousness of the injury, he immediately hospitalized himself and his mobility prevented by constant guard and nurse duty. While in this condition the employer's claim agent appeared at his bedside and there, over the petitioner's protest, propounded questions and took down answers by a court reporter. (R. 170) Promised copies of the inquiry (R. 64, 171-174) were not delivered until the day the case was called in the trial court. (R. 88, 89) This statement, together with the petitioner's personal diary (production demanded by employer—R. 88) was used as a part of its plan of defense.

9. The West Virginia Supreme Court in its decision of March 10, 1959, in the case at Bar reasons: "tie tongs were available (to the petitioner) . . . within a few feet of the place where the crew commenced work . . . and, though the crew knew of the availability of the

tongs, none suggested their use in the loading of the Sayre truck." (Parenthetical language supplied) (Appendix p. 14a)

It is believed, this reasoning is falacious because it, in effect, holds that the petitioner could *assume the risk of his employment*. Such is contrary to the Federal statutes (45 USCA 54) and of the many decided cases of this Court. It is contrary to the holdings of the Supreme Court of Appeals of West Virginia in *Walls* v. *McKinney*, 139 W. Va. 866, 81 S.E. 2d 901, wherein it is said:

> "The master is liable for negligence in failing to use due care to furnish his employee reasonably safe machinery and appliances notwithstanding the employee knew of the danger and with such knowledge used such machinery."

The West Virginia Appellate Court's opinion in the case at Bar quotes with approval the proper rule of law, (Appendix p. 12a) but fails to follow the same.

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. (Italics supplied)

Even though the correct rule was enunciated, yet West Virginia Appellate Court failed to follow the same. In a vein of confession and avoidance it holds that the facts here do not constitute negligence, *even the slightest*. Then, again, the West Virginia Supreme Court of Appeals uses this language in its opinion in the case at bar: (Appendix p. 13a)

> "The fact remains, however, as established by decisions of Federal Courts, indeed by the very wording of the Act, that to create liability thereunder actionable negligence must be established against the employer proceeded against."

Then, in its efforts to apply this rule the West Virginia Court argues that the tongs were not needed because their use would have required a higher lift (this is because the bed of the old fashioned high bedded truck stood too high). This position assumes tie tongs would have been necessary to load an ordinary commercial truck. However, the railroad subjected the petitioner to the task of lifting ties to the higher elevation, with or without tongs—a situation not contributed to or produced by the petitioner. How easily would it have been for the employer to have refused to load the truck or to have requested the truck owner to assume the loading responsibility. On the contrary, the employer undertook to load this truck, (R. 217) and thus adopted this situation as its own. The assumption of responsibility carries with it the hazards of liability.

10. The argument advanced in the West Virginia Appellate Court's opinion to the effect that the retina detachment could have resulted from other causes (naming many) contradicts another part of its own opinion wherein it is stated: (Appendix p. 12a)

> "It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the results to other causes. . ."

The holding of the West Virginia Court that the petitioner's injury could have resulted from other causes, is not only in conflict with its own decisions, but is contrary to the consistent holding of this court.

*Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 1 L. Ed. (2d) 493. (using same language as last above quote)

The test of negligence liability is stated in *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358. It says:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U. S. 53, 61, 93 L. Ed. 497, 504, 69 S. Ct. 413. The straw boss had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of tract. *The likelihood of injury to men pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue.* To us it appears to be a debatable issue on which fair minded men would differ." (Italics supplied)

Again, the opinion of the Supreme Court of West Virginia in the case at Bar contains this statement:

> ". . . there is not the slightest proof that injury occurred because of any extra or more strenuous work than that of 'just average labor'. . . ." (Appendix p. 15a )

In arriving at this conclusion the Court completely ignored the testimony in the record, and as well the effect under the law of a jury verdict, as defined by its previous pronouncements. The West Virginia Court has set itself up as a substitute for, and assumed the function of the jury. The Supreme Court of Appeals of West Virginia in *Pritt* v. *W. Va. N.R.R. Co.*, 132 W. Va. 184, 51 S. E. 2d 105 in a *FELA* case, held:

> "It seems unnecessary to restate the position of this Court on the weight that will be given to the finding of a jury on a question of fact. Here the issue involved of whether defendant was negligent by reason of the direction given to the plaintiff by its agent and employee, the conductor, is a question of fact on which different men might reach different conclusions. The jury by its verdict has held that the defendant was guilty of negligence. We would not be justified in disturbing that finding unless we believed such verdict to be plainly wrong. We are therefore of the opinion that the verdict of the jury on the matters submitted to it must be upheld."

The case of *Stewart* v. *Baltimore & Ohio R. Co.*, 137 Fed. 2d 527 holds:

> "There have been many decisions which have held that it is negligent to require a workman to move articles that are too heavy for him to lift without help."

The Supreme Court of the United States in a long and unbroken line of decisions, among which is the leading case of *Rogers* v. *Missouri P. R. R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, lays much stress on a jury verdict, and cautions the lower courts to respect the same. It says:

> "Under this statute (Federal Employers' Liability Act) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought . . ."
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of

his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death, which is the subject of the suit." (Parenthetical language supplied)

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"The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases."

11. The Supreme Court of Appeals of West Virginia, in the case at Bar, had some conviction that the plaintiff's evidence might have been sufficient to establish negligence, when it said: (Appendix p. 15a) ". . . the only direct evidence which can be pointed to as tending to show that plaintiff's injury occurred because of, or was occasioned by, the loading of the Sayre truck, is his own statement. . . ." Then the court held that despite such "direct evidence" it did not support the jury verdict. The holding in the West Virginia Supreme Court violates the mandate of *Moore* v. *Terminal R. R. Association*, 3 L. Ed. 2d 24, where this language is found: (Headnote)

"In an action under the Federal Employers' Act, the United States Supreme Court will reverse a judgment of a state court revising a judgment entered on a verdict in favor of a railroad employee who was injured when a hand cart he was pulling along a railroad station platform, and which he turned in seeking to pass other carts on the platform, struck a train moving into the station along one side of the platform and caused the employee to be thrown against a railroad car standing along the other side of the platform, where the proofs justify with reason

the jury's conclusion that employer negligence played a part in producing the employee's injury."

*Gibson* v. *Thompson*, 355 U. S. 18, 2 L. Ed. 2d 1, continues to follow the rule in the *Moore* case. It says:

> "In an action by a railroad engineer seeking recovery, under the Federal Employers' Liability Act, for injuries sustained when the engineer, while walking to his engine, slipped upon loose gravel on the surface of the railroad yard, the District Court, Harris County, Texas, entered judgment on a jury verdict in plaintiff's favor, and the judgment was affirmed by the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas—. . . . The Supreme Court of Texas reversed the judgment below on the ground of the insufficiency of the evidence to show negligence on the part of the railroad—. . . . The engineer sought a writ of certiorari in the United States Supreme Court."
>
> "— the United States Supreme Court granted the petition for certiorari and reversed the judgment of the Supreme Court of Texas, holding that the proofs justified the jury's conclusion that employer negligence played a part in producing the engineer's injury."

*Ferguson* v. *Ry. Co.*, 356 U. S. 41, 2 L. Ed. 2d 571, holds:

> "A railroad employee who stepped backward when a train approached on tracks near which he was working, and fell into a ditch or water drain and was injured, sought recovery against the railroad in an action under the Federal Employers' Liability Act, instituted in the Circuit Court of Lawrence County, Missouri. At the close of the employee's case, the trial court directed a verdict for the defendant, and the judgment entered thereon was affirmed by the Supreme Court of Missouri. . . . The employee sought a writ of certiorari in the United States Supreme Court."

> ". . . the United States Supreme Court granted certiorari and reversed the judgment below holding that the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the employee's injury."

The case of *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511, deals with foreseeability of the injury complained of. The decision of the Supreme Court of West Virginia in the case at Bar, seems to imply that the injury here was not forseeable, and employer asserts this defense in both the trial and State Appellate Courts. The opinion in the *Ferguson* case says:

> "The respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases . . . (Same rule as F.E.L.A. cases)—could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner m i g h t be tempted to use a knife to perform his task with dispatch since no adequate implement was furnished him." (Parenthetical language supplied).

In the *Stewart* case, *supra*, the Court cited numerous cases where negligence in failing to furnish sufficient force to do heavy work resulted in recovery for the injured employee. In one, the employee sustained a wrenched and strained back and dislocated vertebra from carrying a too heavy timber over broken ground; in another, the employee received a double rupture from car-

rying a heavy rail; in another, a broken leg was suffered by an inexperienced workman in attempting to lift a heavy piece of glass; still another, a back injury from lifting a heavy handcar from the ground to a box car; and in one, the employee sustained a hemorrhage from lifting a heavy angle iron to a platform.

If petitioner had, as a result of strain and over-exertion, sustained a strained muscle, wrenched back, hernia, or had suffered a hemorrhage, it appears that the West Virginia Supreme Court of Appeals should have recognized each of these injuries as being one of a class which might reasonably be anticipated to result from strain and over-exertion. The medical witnesses in the case at Bar as previously stated, were highly trained and experienced in their field. They testified that the trauma sustained by Crookham was the competent producing cause of the detached retina; (R. 103) that the strain resulting from the lifting was the only type of trauma that the doctors could associate with the detachment of the retina. (R. 112) The jury by its verdict accepted this theory and confirmed this position. The requirement of the law is that the employer should anticipate the consequence or an injury of the general nature of that which ensued. *Gibson* v. *Thompson*, 355 U. S. 18, 2 L. Ed. 2d 1, 78 S. Ct. 2.

Specially, this Court has held that the likelihood of injury to men pulling or lifting railroad ties beyond their capacity is obvious and that the question of negligence and proximate cause (including therein the element of foreseeability or anticipation) of injury in such a case are questions for the jury. *Stone* v. *N. Y. C. & St. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358.

The Court has also held that only the slightest amount of proof is necessary to require submission of the issue of

negligence and proximate cause to the jury, where the absence of foreseeability is raised as a defense. *Ringhiser* v. *Chesapeake & O. Ry. Co.*, 354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268.

12. Immediately prior to the injury petitioner, Ray Crookham, was only sixty three years of age, in good health, and had never had any organic eye trouble. Only shortly before the injury his eyes were examined and pronounced to be sound (R. 91-92); that Dr. Pinschmidt said that before operating he found that the eye was within normal limits otherwise he would not have operated; (R. 101) that petitioner was in excellent health is supported by the fact that he struggled throughout the day of December 28, 1955, lifting at frequent times all of one half of many heavy water-soaked railroad ties until eighty ties were loaded and the petitioner had ruptured the retina of his eye. (R. 55) Had the petitioner been weak or infirm, this physical ordeal would have broken his endurance. As a result of this continued and sustained strain in obedience to the instructions (and lack of supervision) of his foreman, Crookham is permanently and totally disabled. Despite this total disability, the Supreme Court of Appeals of West Virginia has denied to him the benefit of his jury verdict, thus denying to him the protection afforded him under the Federal statutes and the Constitution of the United States.

## CONCLUSION

It is respectfully submitted that the opinion of the Supreme Court of Appeals of West Virginia, in this case, is in conflict with the express provisions of the Federal Employers' Liability Act and the controlling decisions of this Court construing that Act; that a writ of certiorari should be granted in order for this Court to review the record and the opinion of the Supreme Court of Appeals of West Virginia, in accordance with the prayer of this petition.

Respectfully submitted,

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